Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

SCOTT CYPRIAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in affirming a conviction under 21 U.S.C. § 861(a)(2) where the conduct committed does not falls within the child use conduct proscribed by 21 U.S.C. § 861(a)(2); "Unlawful to use a person under 18 years of age to assist in avoiding apprehension for drug trafficking".

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Honorable United States Court of Appeals for the Fifth Circuit whose judgment is sought to be reviewed, Scott Cyprian, as Defendant-Appellant, and the United States of America, as Plaintiff-Appellee.

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CITATIONS OF OPINIONS AND ORDERS

The judgment sought to be reviewed is the judgment of the Honorable United States Court of Appeals for the Fifth Circuit. It is found in the Federal Reporter. *See United States v. Scott Cyprian*, 197 F.3d 76 (5th Cir. 1999). The aforementioned judgment affirmed the judgment entered by the United States Court for the Eastern District of Louisiana in that certain criminal action entitled *United States v. Scott Cyprian*, Docket Number Criminal A97-085, on a jury verdict returned after a trial on the merits. The District Court's judgment is not reported in the Federal Supplement, but is reported at 1998 Westlaw 259967 (E. D. La.)

JURISDICTION

On December 3, 1999, the United States Court of Appeals for the Fifth Circuit entered the judgment sought to be viewed in this criminal case. Thereafter, on December 3, 1999, United States Court of Appeals for the Fifth Circuit entered an Order affirming Defendant's conviction in the Lower Court. This Court now has jurisdiction for review of the aforementioned judgment under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 861(a) of Title 21, United States Code, provides:

Employment or use of persons under 18 years of age

(a) Unlawful acts – It shall be unlawful for any person at least eighteen years of age to knowingly and intentionally –

(1) employ, hire, use, persuade, induce, entice, or coerce, a person under eighteen years of age to violate any provision of this subchapter or subchapter II of this subchapter;

(2) employ, hire, use, persuade, induce, entice, or coerce, a person under eighteen years of age to assist in avoiding detection or apprehension for any offense of this subchapter or subchapter II of this by any Federal, State, or local law enforcement official;

(3) receive a controlled substance from a person under 18 years of age, other than an immediate family member, in violation of this subchapter or subchapter II of this chapter.

STATEMENT

The evidence presented at trial showed that Cyprian was riding as a passenger in a car, holding his infant son on his lap while carrying crack in his pocket. Agents stopped the car to arrest Cyprian for possession with intent to distribute crack. Appearing to comply with the agents' arrest orders, Cyprian got out of the car. As the officers moved toward him to apprehend him, he threw

his son at the agents and ran away, only to be caught after a brief pursuit. Pet. App. B 16.

There was no evidence that defendant brought his son along for the drive to serve as a decoy or to avert suspicion of possible drug activities. In fact, there was evidence that defendant brought his son for anything other than baby-sitting purposes or that defendant entertained an intention, before the car was stopped, or in any way using his son to avoid detection or apprehension. Pet. App. B 16.

On March, 27, 1997 the Grand Jury returned a true bill indicting defendant, Scott Cyprian, and alleged co-conspirators, Kevin Silvan and Pat Carney with the following violations:

Count 1. Beginning at a time unknown, but continuing until on or about March 19, 1997, in the Eastern District of Louisiana and elsewhere, the defendants did knowingly and intentionally combine, conspire, confederate and agree with each other and with others known and unknown to the Grand Jury, to possess with the intent to distribute a quantity of cocaine base ("crack"), a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. § 841(a)(1); all in violation of 21 U.S.C. § 846. Pet. App. B 14.

Count 2. On or about February 20, 1997, in the Eastern District of Louisiana and elsewhere, the defendants, Kevin Silvan and Pat Carney, did knowingly and intentionally distribute a quantity of cocaine base ("crack"), a Schedule II narcotic drug controlled substance; all in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Pet. App. B 14.

Count 3. On or about March 19, 1997, in the Eastern District of Louisiana and elsewhere, the defendant, Scott Cyprian, did knowingly and intentionally possess with the intent to distribute a quantity of cocaine base ("crack"), a schedule II narcotic drug controlled substance; all in violation of 21 U.S.C. § 841(a)(1). Pet. App. B 14.

Count 4. On or about March 19, 1997, in the Eastern District of Louisiana, the defendant, Scott Cyprian, a person at least 18 years of age, knowingly and intentionally used "D.R.", a male juvenile, a person under 14 years of age, to assist in avoiding detection or apprehension by a federal law enforcement official for possession with the intent to distribute a quantity of cocaine base ("crack"), a Schedule II narcotic drug controlled substance; all in violation of 21 U.S.C. §§ 841(a)(1) and 861(a)(2). Pet. App. B 14-15.

Count 5. On or about March 19, 1997, in the Eastern District of Louisiana and elsewhere, the defendant, Pat Carney, did knowingly and intentionally possess with the intent to distribute a quantity of cocaine base ("crack"), a Schedule II narcotic drug controlled substance; all in violation of 21 U.S.C. § 841(a)(1). Pet. App. B 15.

Trial began on April 6, 1998. On April 9, the jury returned a unanimous verdict, acquitting co-defendants on all counts charged to them and convicting defendant Scott Cyprian on all three counts charged to him. Defendant also moved for a judgment of acquittal as to Count 4 on statutory construction grounds, maintaining that his conduct, even when viewed in the light most favorable to

the verdict, does not fall within the prohibited conduct addressed by the statute. Pet. App. B 15.

The Court of Appeals, Rhesa Hawkins Barksdale, Circuit Judge, held that: (1) as a matter of first impression, child-use conviction did not require taking advantage of juvenile's lack of intellect or reasoning ability; (2) throwing three-year-old child toward arresting officers, in attempt to avoid apprehension for drug trafficking, was proscribed "child-use" conduct; (3) evidence was sufficient to support conspiracy conviction; and (4) multiple conspiracy instruction was not required. Affirmed. Pet. App. A 1.

SUMMARY OF ARGUMENT

I. The conduct of throwing or dropping a child while attempting to escape is not the type of conduct that 21 U.S.C. § 861(a)(2) was intended to proscribe. Case law that has identified proscribed conduct under § 861(a)(2) is clearly distinguished from conduct committed in the instant case.

Jurisprudence is sparse under this apparently seldom-used statute, reviewing courts have implicitly recognized that Congress intended the statute to address the problem of corruption of minors by drug dealers. Indeed, in some cases the Government has called expert witnesses to describe the growing problem of adult dealers enlisting the assistance of juveniles to effectuate drug violations or to avoid capture.

In *United States v. Chin*, 981 F.2d 1275, at 1278 (D.C. Cir. 1992), for instance, a Government narcotics expert

explained to the jury that drug dealers often use juveniles because "virtually nothing" will happen to the juvenile if he is arrested and enters the court system and, perhaps more importantly, because juveniles are often willing to participate in major drug transactions for only $200 or $300 per day.

Similarly, the defendants in an Eleventh Circuit Court of Appeals case called a minor and asked him to pick them up after their car broke down on the way to a drug transaction. *United States v. Curry*, 902 F.2d 912 (11th Cir. 1990). The juvenile responded by picking up the defendants, who transferred the contents of their car to his pickup; the juvenile rode with the defendants across the street and was present when the transfer of the narcotics to his truck from the sellers took place.

The Court in *Curry*, like the Court in *Chin*, recognized that the purpose of the statute is to prevent the corruption of young people by sophisticated adult traffickers. The Court described the Juvenile Drug Trafficking Act of 1986, which created the prohibition against using minors to violate the drug laws or to assist in avoiding detection or apprehension thereof, as "an acknowledgment of the fact that youths are easily susceptible to outside pressures" and as part of an attempt to deter criminals from including minors as participants in their illegitimate activities. 902 F.2d at 915.

II. Definition of use as adopted by the Fifth Circuit is contrary to definition adopted by other circuits and as intended by congressional intent.

The common denominator in these decisions, and an inevitable feature of the congressional goal, is to prohibit the corruption of minors by an adult. The only intent of Congress, either expressed or implied, that can be inferred from the legislative history and face of the statute, and the case law concerning this statute is that Congress intended to protect juveniles because of their susceptibility to the influence of wayward adults. The naiveté and inexperience in the affairs of life makes juveniles especially vulnerable and this is the vulnerability that Congress intended to protect.

"The meaning of statutory language, plain or not, depends on context." *Bailey v. United States*, 516 U.S. 137, 145, 116 S.Ct. 501, 506, 133 L.Ed.2d 472 (1995). In defining the word "use" in context with the other words, "employ, hire, persuade, induce, entice, or coerce", leads to "use" having a meaning subscribing to taking advantage of a juvenile's lack of intellect or reasoning ability.

When the Fifth Circuit Court of Appeals held "the word 'use' in the statute proscribing use of person under 18 years of age to assist in avoiding apprehension for drug trafficking does not require taking advantage of the juvenile's lack of intellect or reasoning ability." This definition is contrary to the definitions applied to the conduct in other Circuits putting them at odds.

ARGUMENT

I. The conduct of throwing or dropping a child while attempting to escape is not the type of conduct that 21 U.S.C. § 861(a)(2) was intended to proscribe. Case law that has identified proscribed conduct under § 861(a)(2) is clearly distinguished from conduct committed in the instant case.

21 U.S.C. § 861(a)(2) does not apply to the action he took with his child. Cyprian contends that his § 861(a)(2) conviction for using his child to avoid apprehension is invalid because his conduct with the child did not fall within the type of conduct proscribed by the Statute. In examining the type of conduct that has been held to violate § 861(a)(2), the common thread is that the conduct has been to prevent the discovery of the crime or criminal activity.

In examining the type of conduct that has been held to violate 21 U.S.C. § 861(a)(2), the Court in *United States v. Curry*, 902 F.2d 912 (11th Cir. 1990), affirmed the convictions of two defendants who were convicted of various narcotic offenses finding that defendants had used a minor in a drug transaction in an attempt to avoid detection or apprehension.

When appellants, Butler and Ronald Hayes were indicted and convicted under count 16 of violating subsection 845(b)(2) they challenged the conviction under grounds that under the facts of this case they did not violate the subsection.

In this case, the evidence shows that Hayes and Butler were intending to purchase a large quantity of cocaine at the time their car broke down. Once their car

became inoperable, Hayes and Butler could have chosen simply to walk across the street and consummate their planned purchase of cocaine. Instead however, they decided to wait until they had a truck and driver who could both surreptitiously transport them across the street where they would obtain the cocaine and then drive them quickly and safely away from that locale. A readable inference for this jury to draw from this evidence is that Butler and Hayes believed that using a vehicle would assist them in avoiding detection and arrest for this task, and Butler's nephew, was a minor. These acts are sufficient to support jury's conviction that Hayes and Butler knowingly and intentionally used a person under 18 years of age to assist in avoiding detection or apprehension.

In the case the evidence shows that Butler and Hayes waited to have a truck and a driver who could surreptitiously transport them across the street where they would obtain the cocaine and then quickly drive away. *Curry, supra.*

In *United States v. Bullock,* 203 F.3d 823, 2000 WL 84449 (4th Cir. Md.), George's conviction under this statute was founded upon the events surrounding his Washington, D.C. arrest on April 14, 1993. On that date, George and a travel companion, April Davis, were arrested after arriving in Washington by bus from New York. The two were arrested because police found a quantity of cocaine base in a diaper bag that Davis was carrying. Davis also had her seven-month-old daughter with her.

The Court concluded that there was substantial evidence to support George's conviction under this statute. Although there was no direct evidence that the infant was used to avert suspicion, the jury could reasonably have drawn the inference that the infant's presence was intended to help avoid detection (*United States v. Bullock*, 203 F.3d 823, 833, 2000 WL 84449 (4th Cir. Md.)). The drugs were hidden in a diaper bag – a bag that would look conspicuously out of place without an accompanying baby. The infant's presence clearly appears to have been intended to throw law enforcement officials off of the courier's trail. Furthermore, evidence from that trial indicated that drug dealers were known to use women with children in transporting drugs and that the participants in the Hester organization had employed such practices before. Given all this evidence we hold that the Government's evidence sufficiently supported George's conviction under § 861(a)(2). *See Bullock, supra.*

United States v. Chin, 981 F.2d 1275 (D.C. Cir. 1992). Henry Chin was arrested at Union Station after cocaine found taped onto the back of another person was determined to belong to Chin. A jury found Chin guilty of possessing cocaine with intent to distribute in violation of 21 U.S.C. § 841(a) and of using a person under eighteen years of age to avoid detection for a drug offense in violation of a provision of the Juvenile Drug Trafficking Act.[1]

---

[1] The Juvenile Drug Trafficking Act of 1986, Pub.L.No. 99-570, 100 Stat. 3207-10 (1986), represents a congressional recognition of the troublesome societal problem created when drug traffickers seek to include minors in their illegal activities.

A conviction under 21 U.S.C. § 861(a)(2) can be held only upon proof that the person knowingly and intentionally made use of another for the purpose of concealing a violation or for the narcotics laws. *United States v. Chin*, 981 F.2d 1275, 1281 (D.C. Cir. 1992).

The common denominator in these decisions, and an inevitable feature of the congressional goal, is to prohibit the corruption of minors by an adult. The only intent of Congress, either expressed or implied, that can be inferred from the legislative history and face of the statute, and the case law concerning this statute is that Congress intended to protect juveniles because of their susceptibility to the influence of wayward adults. The naiveté and inexperience in the affairs of life makes juveniles especially vulnerable and this is the vulnerability that Congress intended to protect.

While "not a model of meticulous drafting," *United States v. Chin*, 981 F.2d 1275, 1279 (D.C. Cir. 1992) (Bader Ginsburg, J.), the language of § 861(a)(2) is broad and unambiguous. It is this broadness of language that when used by the Court of Appeals to expand or create a right of conduct that is not proscribed or clearly defined violates the fair warning requirement of the due process clause.

The Due Process Clause bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope, *see, e.g., Marks v. United States*, 430 U.S. 188, 191-192, 97 S.Ct. 990, 992-993, 51 L.Ed.2d 260 (1977). Under this guise, the touchstone is

whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal.

A truer interpretation of § 861(a)(2) would require the adult to enlist the juvenile to act without the juvenile having knowledge of the illegality of his conduct, yet this conduct must be volitional on the part of the minor. It could be argued that this interpretation would negate punishment for a person who conceals cocaine in the diaper of a newborn. However, § 861(a) creates the necessary mens rea that would impute knowledge and intention into the conduct of the adult because of the newborn's inability to act or comprehend in a fashion that would make his conduct illegal.

It appears this reasoning is faulty in that the Court assumes knowledge *and intent* sufficient enough to meet the requirements of § 861(a) on the part of the minor. Section 861(a)(2) requires purposeful participation but without the requisite mens rea that would make the minor guilty under § 861(a)(1).

"The meaning of statutory language, plain or not, depends on context." *Bailey v. United States*, 516 U.S. 137, 145, 116 S.Ct. 501, 506, 133 L.Ed.2d 472 (1995). In defining the word "use" in context with the other words, "employ, hire, persuade, induce, entice, or coerce", leads to "use" having a meaning subscribing to taking advantage of a juvenile's lack of intellect or reasoning ability.

II. Definition of use as adopted by the Fifth Circuit is contrary to definition adopted by other circuits and as intended by congressional intent.

The two opposing issues advanced in the Fifth Circuit Court of Appeals were: (1) the Defendant-Appellant Cyprian urged that the minor not being aware of the illegal action is what keeps § 861(a)(2) from being redundant with § 861(a)(1) which uses the same verbs concerning a person over 18 years of age causing another that age to violate the drug trafficking laws.

The Fifth Circuit Court advanced the notion that the Defendant-Appellant was concomitantly advancing a restricted uncommon definition of "use" in order to make this assertion plausible. The Fifth Circuit went further in limiting the definition of use to "taking advantage of a juvenile's lack of intellect or reasoning ability," as opposed to the specific intent of the statute.

The Government countered that volitional conduct by a juvenile is involved in subpart (a)(1), not in (a)(2), and that this is what prevents redundancy between these subparts. This was an issue of first impression for the Fifth Circuit (Pet. App. A).

In arriving at a decision between these two issues, the Court first attempted to consider a "normal" definition for use. The Court stated, "Of course, the normal definition of use is a far cry from that urged by Cyprian for Subpart (a)(2)." Black's Law Dictionary 1540, 7th ed. 1999 defined use as "the application or employment of something." (Pet. App. A) Similarly, use is defined in Webster's Ninth New Collegiate Dictionary, 1299, as "the

act or practice of employing something"; "A method or manner of employing something."

This represents research of a very limited scope in attempting to define the word use. The Oxford English Dictionary requires four pages to define use. The Oxford English Dictionary (2d ed., 1989, 351-354).

Black's Law Dictionary further defines use as both a verb and a noun. The definition advanced by the Fifth Circuit is the first definition found under use as a noun in Black's Law Dictionary. Black's Law Dictionary, 6th ed. 1991, 1541. Yet, the Fifth Circuit Court acknowledges that the word use is a verb in the context of the statute.

Finally, the Fifth Circuit resorted to adopting the definition of "use" as defined in *Bailey v. United States*, 516 U.S. 137, 145, 160, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995). In that the Court has adopted the definition of use "as discussed in *Bailey, supra,* which applies to 18 U.S.C. § 924(c)(1) which prohibits using or carrying of a firearm in a drug trafficking crime.

In adopting this definition, must future litigants also apply the active employment prong of "use" for purposes of the statute which criminalize "use" of a firearm during and in relation to drug trafficking offenses. Will the Fifth Circuit now require that the person under eighteen years of age be brandished, displayed, bartered, struck with, and most obviously, fired or attempted to be fired, as a firearm in accordance with 18 U.S.C. § 924(c)(1).

The Fifth Circuit attempts to reconcile their holding with the Eleventh Circuit in *Curry, supra* by stating "Our interpretation of this Subpart is consistent with that by

the Eleventh Circuit in *Curry*," there the two conspirators were attempting to purchase cocaine, while enroute their automobile broke down. They called an under 18 nephew of one of the co-conspirators to bring his vehicle to them. The co-conspirator utilized the truck to transport the drug with the youth remaining in the vehicle as a passenger. In affirming Subpart (a)(2) conviction of one co-conspirator, the Court held "a reasonable inference for the jury to draw from this evidence is that the co-conspirators believed that using a vehicle would assist them in avoiding detection and arrest and that the individual they chose for this task was under 18 years of age." The Eleventh Circuit held that "this was sufficient for a Subpart (a)(2) conviction for the proscribed use of a child." This analogy is faulty in that the Fifth Circuit compares the child in the instant case with the truck in *Curry, supra.*

The rule of lenity is the rule of statutory interpretation, which dictates that statutory ambiguity must be resolved in favor of leniency and prohibits the Court from interpreting an ambiguous statute in a way that maximizes the penalty. *United States v. Brito,* 136 F.3d 397, 408 (5th Cir. 1998).

CONCLUSION

The doctrine of lenity applies to those situations in which reasonable doubt persists about statute's intended scope, even after resort to language's structure, legislative history and motivating policies of the statute. *Bifulco v. United States,* 477 U.S. 381, 100 S.Ct. 2252 (1980). For the

foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-30709

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SCOTT CYPRIAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana

(Filed Dec. 3, 1999)

Before DUHÉ, BARKSDALE and DENNIS, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

Primarily at issue is whether throwing a three-year-old child toward arresting officers, in an attempt to avoid apprehension for drug trafficking, falls within the "child-use" conduct proscribed by 21 U.S.C. § 861(a)(2) (unlawful to "use . . . a person under eighteen years of age to assist in avoiding . . . apprehension for" drug trafficking). Convicted by a jury for conspiracy to possess with intent to distribute cocaine base, for the corresponding substantive offense, and for the earlier-described child-use, Scott Cyprian does *not* contest his intent to distribute conviction. He does contest his conspiracy and child-use convictions, contending that § 861(a)(2) does *not* apply to the

action he took with his child; that there was insufficient evidence to convict him for either offense; and that there was a prejudicial variance between the indictment and the proof. We **AFFIRM.**

I.

On 20 February 1998, Melinda James, at Cyprian's behest, met with undercover DEA Agent Honore and, for $6,000, sold him a quarter kilogram of cocaine base (crack). Part of the transaction was recorded.

Approximately two weeks later, James met with Special Agent Sewell. After listening to part of the recording of her sale to Agent Honore, James agreed to serve as a confidential informant to assist in Cyprian's arrest.

On 19 March, James met with Cyprian; he informed her that he had crack for sale. James called Special Agent Sewell, who instructed her to make a crack sale, through Cyprian, to the undercover Agent. James contacted Cyprian to arrange the sale; at the last minute, Cyprian decided to accompany James in her vehicle to the sale, and brought his three-year-old child.

DEA Agents stopped the vehicle and ordered Cyprian to exit. Cyprian, who had his child in his lap, exited slowly, threw his child at the Agents, and fled. He was quickly apprehended. And, upon Cyprian's jacket being searched, 250 grams of crack were found.

In March 1997, as one of three indicted co-conspirators, Cyprian was charged with conspiracy to possess with intent to distribute crack, in violation of 21 U.S.C.

§ 846; possession with intent to distribute crack, in violation of 21 U.S.C. § 841(a)(1); and using his child to assist in avoiding apprehension by a federal law enforcement official for the intent to distribute charge, in violation of 21 U.S.C. § 861(a)(2).

A jury trial was held in April 1998. At the conclusion of all the evidence, Cyprian moved for a judgment of acquittal; it was denied. He was convicted on all counts; his two co-defendants, acquitted. In denying Cyprian's post-verdict, second motion for judgment of acquittal, the district court held, *inter alia*, that § 861(a)(2)'s language was unambiguous; and that Cyprian's "use" of his child fell within the conduct proscribed by the statute. Cyprian was sentenced, *inter alia*, to 262 months imprisonment.

II.

Cyprian does *not* challenge his possession with intent to distribute conviction. For the other two, he claims evidentiary insufficiency, and a prejudicial variance between the indictment and the proof; in addition, for the § 861(a)(2) conviction, that his actions with his child could *not* violate the statute. We address the statutory issue first.

A.

Section 861, originally codified as 21 U.S.C. § 845b, was enacted as part of

> [t]he Juvenile Drug Trafficking Act of 1986, Pub.L. No. 99-570, 100 Stat. 3207-10 (1986), [which] represents a congressional recognition

> of the troublesome societal problem created *when drug traffickers seek to include minors in their illegal activities.* As an acknowledgment of the facts that youths are easily susceptible to outside pressures and in an attempt to deter criminals from including minors as participants in their illegitimate activities, Congress enacted several new offenses with *enhanced penalty provisions.*

United States v. Curry, 902 F.2d 912, 915-16 (11th Cir. 1990) (emphasis added), *cert. denied,* 498 U.S. 1091 (1991). Section 861(a) provides:

> It shall be unlawful for any person at least eighteen years of age to *knowingly and intentionally* –
>
> (1) employ, hire, *use,* persuade, induce, entice, or coerce, a person under eighteen years of age *to violate* any provision of this subchapter or subchapter II of this chapter;
>
> (2) employ, hire, *use,* persuade, induce, entice, or coerce, a person under eighteen years of age *to assist in avoiding detection or apprehension* for any offense of this subchapter or subchapter II of this chapter by any Federal, State, or local law enforcement official. . . .

(Emphasis added.)

The requisite *mens rea* for conviction under § 861 ("unlawful for any person at least eighteen years of age to *knowingly and intentionally*" conduct proscribed acts with "person under eighteen years of age" (emphasis added)) is, of course, addressed to the person charged (here, Cyprian, the person at least 18 years of age), *not* the non-charged person under 18 years of age (here, his three-year-old child). *See, e.g.,* ***United States v. Williams,***

922 F.2d 737 (11th Cir.), *cert. denied*, 502 U.S. 892 (1991); ***United States v. Valencia-Roldan***, 893 F.2d 1080 (9th Cir.), *cert. denied*, 495 U.S. 935 (1990). Cyprian does *not* assert otherwise.

Instead, Cyprian contends that his § 861(a)(2) conviction for "using" his child to avoid apprehension is invalid, because his child did *not* purposefully act to so assist Cyprian. Cyprian's contention is based, in part, on the word "use" being in series with "employ, hire, . . . persuade, induce, entice, or coerce", all suggesting that the minor is being paid, forced, or otherwise caused to act with volition to assist another, even if the youth is *not* aware that he is involved in the illegal activity.

Cyprian urges that this aspect – *not* aware of illegal action – is what keeps § 861(a)(2) from being redundant with § 861(a)(1), which uses the same verbs concerning a person over 18 years of age causing another under that age "to violate" the drug trafficking laws. Obviously, in order to make this construction of subpart (a)(2) plausible, Cyprian concomitantly advances a restricted, uncommon definition of "use"; he maintains that it means "taking advantage of a juvenile's lack of intellect or reasoning ability".

For starters, had Congress intended this extremely narrow definition, it would, and could easily, have said so. In any event, the Government counters that volitional conduct by a juvenile is involved in subpart (a)(1), *not* in (a)(2); and that this is what prevents redundancy between these subparts.

This appears to be an issue of first impression for our court. We turn first, of course, to the plain language of the

statute. *E.g.*, ***Bailey v. United States***, 516 U.S. 137, 145 (1995); ***Greyhound Corp. v. Mt. Hood Stages, Inc.***, 437 U.S. 322, 330 (1978); ***Moosa v. INS***, 171 F.3d 994, 1008 (5th Cir. 1999). Again, subpart (a)(2) provides, in relevant part, that it is "unlawful for any person at least eighteen years of age to knowingly and intentionally . . . use . . . a person under eighteen years of age to assist in avoiding . . . apprehension for [a drug trafficking] offense . . . by any . . . law enforcement official". (Emphasis added.)

Of course, the normal definition of "use" is a far cry from that urged by Cyprian for subpart (a)(2). ***Black's Law Dictionary*** 1540 (7th ed. 1999) defines "use" as "[t]he application or employment of something". Similarly, "use" is defined in ***Webster's Ninth New Collegiate Dictionary*** 1299 (9th ed. 1990) as the "act or practice of employing something; . . . a method or manner of employing . . . something".

As discussed in ***Bailey***, 516 U.S. at 145 (definition of "use" in 18 U.S.C. § 924(c)(1), which concerns using or carrying a firearm in a drug trafficking crime), "these various [dictionary] definitions of 'use' imply action and implementation". And, as pointed out in ***Bailey***, in addition to looking to the plain meaning, we look to "placement and purpose in the statutory scheme", and "assume that Congress intended each of its terms to have meaning". ***Id.*** Along this line, "[w]e assume that Congress used two [or more] terms because it intended each term to have a particular, nonsuperfluous meaning". ***Id.*** at 146.

To give "use" in subpart (a)(2) the meaning advanced by Cyprian – "taking advantage of a juvenile's lack of

intellect or reasoning ability" – would render the word superfluous. This strained meaning would be subsumed within other methods proscribed by subpart (a)(2), such as "persuade, induce, or entice". To adopt Cyprian's definition of "use" would be contrary *not* only to well-known rules of statutory construction, but to common sense as well.

In sum, there is *no* ambiguity. Accordingly, the rule of lenity, urged by Cyprian, does *not* apply. *See, e.g.*, ***Muscarello v. United States,*** 524 U.S. 125, 118 S. Ct. 1911, 1919 (1998); ***United States v. Monjaras-Castaneda,*** 190 F.3d 326, 330 (5th Cir. 1999); ***Curry,*** 902 F.2d at 915 (as discussed *infra,* construing § 861(a)(2) and finding *no* ambiguity concerning "using" a youth).

Here, the actor is Cyprian. As found by the jury, discussed infra, he "knowingly and intentionally" "used" his three-year-old child as a projectile to distract the Agents, and then fled. In short, he used his child "to assist in avoiding . . . apprehension", as proscribed by § 861(a)(2).

Our interpretation of this subpart is consistent with that by the Eleventh Circuit in ***Curry,*** noted *supra.* There, two co-conspirators were attempting to purchase cocaine. While en route, their automobile broke down; they called the under-eighteen nephew of one co-conspirator to bring his vehicle to them. The co-conspirators utilized the truck to transport the drugs, with the youth remaining in the vehicle as a passenger. In affirming the subpart (a)(2) conviction of one co-conspirator, the court held: "A reasonable inference for the jury to draw from this evidence is that [the co-conspirators] believed that using a vehicle

would assist them in avoiding detection and arrest"; and "that the individual they chose for this task . . . was" under 18 years of age. ***Id.*** at 916.

The Eleventh Circuit held that this was sufficient for a subpart (a)(2) conviction for the proscribed "use" of a child. ***Id.*** Although the ***Curry*** court apparently was *not* presented with the definition of "use" issue advanced here by Cyprian for subpart (a)(2) purposes, we read ***Curry*** to be consistent with our rejection of the quite strained interpretation urged by Cyprian.

B.

Cyprian contests the evidentiary sufficiency for his conspiracy and child-use convictions. Because he timely moved for judgment of acquittal on these counts, *see, e.g.*, ***United States v. Pankhurst,*** 118 F.3d 345, 351 (5th Cir.), *cert. denied,* ___ U.S. ___, 118 S. Ct. 630 (1997), we review such claims "in the light most favorable to the jury's verdict and affirm if a rational trier of fact could have found that the government proved all essential elements of a crime beyond a reasonable doubt". ***United States v. Brito,*** 136 F.3d 397, 408 (5th Cir.), *cert. denied,* ___ U.S. ___, 118 S.Ct. 1817 (1998). In so doing, all reasonable inferences are drawn in support of the verdict. *E.g.*, ***United States v. Guerrero,*** 169 F.3d 933, 939 (5th Cir. 1999). Likewise "[w]e must accept credibility choices that support the jury's verdict, and we may *not* reweigh the evidence". ***Id.*** (emphasis added).

1.

Concerning the charged child-use, Agent Sewell testified that Cyprian "threw the boy back over towards [the officers], which at the point when we tried to catch the kid, he took off running". Likewise, Agent Scott testified that Cyprian "lunged the child toward us and took off running". Officer Caminita referred to Cyprian "throwing a baby to the ground head first"; James testified that Cyprian "threw him down".

This is sufficient, to say the least, for a rational juror to find, beyond a reasonable doubt, that Cyprian used the child in order to attempt to avoid apprehension for drug trafficking. For example, one reasonable inference by such a juror would be that Cyprian hoped the Agents would delay pursuing him in order to attend to the child.

2.

Regarding the conspiracy conviction, the evidence included recorded telephone conversations between James and Cyprian, and the testimony of James, a co-conspirator in the 20 February 1999 sale to Agent Honore. James provided a detailed account of the conspiracy, and identified Cyprian as its leader and the source of the crack cocaine that she sold on at least three occasions. This is sufficient for a rational juror to find, beyond a reasonable doubt, that Cyprian conspired to sell crack cocaine.

C.

Cyprian maintains that there was a prejudicial variance between the charged conspiracy and the conspiracy for which he was convicted. In order "to obtain a reversal based upon the alleged variance", Cyprian "must show the variance affected [his] substantial rights". ***United States v. Thomas,*** 12 F.3d 1350, 1358 (5th Cir.), *cert. denied,* 511 U.S. 1095 (1994). "The concerns underlying our cases on variance are to ensure that [, *inter alia,*] the indictment notifies a defendant adequately to permit him to prepare his defense". ***United States v. Hernandez,*** 962 F.2d 1152, 1159 (5th Cir. 1992). In this regard, our court has "long held that when the indictment alleges the conspiracy count as a single conspiracy, but the government proves multiple conspiracies and a defendant's involvement in at least one of them, then clearly there is *no* variance affecting the defendant's substantial rights" ***United States v. Pena-Rodriguez,*** 110 F.3d 1120, 1128 (5th Cir.) (emphasis added) (*quoting* ***United States v. Faulkner,*** 17 F.3d 745, 762 (5th Cir.), *cert. denied,* 513 U.S. 870 (1994)), *cert. denied,* ___ U.S. ___, 118 S. Ct. 72 (1997).

As part of this claim, Cyprian asserts that a multiple conspiracy instruction should have been given. But, in district court, he *neither* raised his variance claim *nor* requested the instruction. *See, e.g.,* ***United States v. Sharpe,*** No. 97-60263, 1999 WL 962025, at *12 (5th Cir. 20 Oct. 1999); ***United States v. Lokey,*** 945 F.2d 825, 832-33 & n.n. 1, 2 (5th Cir. 1991); FED R. CRIM. P. 30 ("No party may assign as error any portion of the charge or *omission therefrom* unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter

to which that party objects and the grounds of the objection." (emphasis added)).

Moreover, it is unclear from Cyprian's brief whether, for the first time on appeal, he is raising the claimed variance, or contesting the failure to give the instruction, or both. No authority need be cited for the rule that points on appeal are abandoned if *not* briefed adequately.

In the light of Cyprian's oral argument, however, it appears that his challenge concerns the failure to give the instruction. And, he conceded at oral argument that, because this issue is being raised belatedly, we review *only* for plain error. Under this quite narrow standard of review, if such failure was a "clear" or "obvious" error that affects "substantial rights", we have discretion to correct such forfeited error if it affects the fairness, integrity, or public reputation of judicial proceedings. *E.g.*, ***United States v. Calverley,*** 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc), *cert. denied,* 513 U.S. 1196 (1995).

In urging plain error for such failure, Cyprian contends that, because the other two named conspirators were acquitted, there was no one with whom he could conspire. But, the indictment shows otherwise:

> Beginning at a time unknown, but continuing until on or about March 19, 1997, in the Eastern District of Louisiana and elsewhere, the defendants, **SCOTT CYPRIAN, KEVIN SILVAN,** and **PAT CARNEY,** did knowingly and intentionally combine, conspire, confederate and agree with each other *and with others known and unknown to the Grand Jury,* to possess with the intent to distribute a quantity of cocaine base ("crack"). . . .

(Emphasis added.) As discussed *supra*, the indictment's *unnamed conspirator* is James, and the conspiracy includes the 20 February 1999 sale to Agent Honore.

The indictment charges one conspiracy involving Cyprian, the two named (and acquitted) co-conspirators, and an unnamed co-conspirator, James. The 20 February sale is within the charged time frame. Therefore, there was *no* error, much less plain error, in *not* giving the now-urged multiple conspiracy instruction.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-30709

D.C. Docket No. 97-CR-85-All-L

UNITED STATES OF AMERICA Plaintiff - Appellee v. SCOTT CYPRIAN Defendant - Appellant	CHARLES R. FULBRUGE III CLERK U.S.DISTRICT COURT EASTERN DISTRICT OF LOUISIANA LORETTA G. WHYTE CLERK

(Filed Dec. 03, 1999)

Appeal from the United States District Court
for the Eastern District of Louisiana, New Orleans.

Before DUHÉ, BARKSDALE, and DENNIS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

ISSUED AS MANDATE: Dec. 28, 1999

APPENDIX B

UNITED STATES,

v.

Scott CYPRIAN,

No. Crim.A. 97-085.

United States District Court,
E.D. Louisiana.

May 20, 1998.

ORDER & REASONS

FALLON, J.

Before the Court is defendant Scott Cyprian's Motion for Judgment of Acquittal. Because the Court finds that there was ample evidence to support conviction on all counts and, as to Count 4, that the conduct established by the evidence is punishable, defendant's motion must be DENIED.

I. BACKGROUND

Defendant was charged in Counts 1, 3, and 4 of a five-count indictment. Count 1 charged defendant and two co-defendants with conspiracy to possess with intent to distribute crack, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Count 2 applied only to co-defendants. Count 3 charged defendant with knowingly possessing with intent to distribute crack, in violation of 21 U.S.C. § 841(a)(1). Count 4 charged defendant with knowingly and intentionally using a juvenile to assist in avoiding detection or apprehension for a violation of 21 U.S.C.

§§ 841(a)(1) and 861(a)(2). Count 5 applied solely to a co-defendant.

Trial began on April 6, 1998. On April 9, the jury returned a unanimous verdict, acquitting co-defendants on all counts charged to them and convicting defendant on all three counts charged to him. Defendant moved for a judgment of acquittal on Counts 1, 3, and 4, asserting insufficient evidence to support a conviction. Defendant also moved for a judgment of acquittal as to Count 4 on statutory construction grounds, maintaining that his conduct, even when viewed in the light most favorable to the verdict, does not fall within the prohibited conduct addressed by the statute.

II. ANALYSIS

A. Sufficiency of the Evidence as to Counts 1, 3, and 4

"In reviewing challenges to the sufficiency of the evidence," this Court must "view the evidence in the light most favorable to the jury's verdict and affirm if a rational trier of fact could have found that the government proved all essential elements of a crime beyond a reasonable doubt." *United States v. Brito*, 136 F.3d 397, 408 (5th Cir.1998) (citing *United States v. Puig-Infante*, 19 F.3d 929 (5th Cir.1994)). In doing so, the Court must "consider the evidence all reasonable inferences that may be drawn from that evidence, and all credibility determinations in the light most favorable to the verdict." *United States v. Hunt*, 129 F.3d 739, 742 (5th Cir.1997) (citing *United States v. Salazar*, 66 F.3d 723, 728 (5th Cir.1995)).

The evidence presented at trial, including recorded telephone conversations, testimony of a co-conspirator, testimony of government agents, and crack recovered from defendant's person as well as from a post-arrest search, is more than sufficient to support a conviction under Count 1 for conspiracy to possess with intent to distribute crack and under Count 3 for possessing with intent to distribute crack.

Count 4 presents a more difficult question. Count 4 charged the defendant with a violation of 21 U.S.C. §§ 861(a)(2) and 841(a)(1). Section 861(a)(2) makes it unlawful for a person 18 years of age or over to "employ, hire, use, persuade, induce, entice, or coerce, a person under eighteen years of age to assist in avoiding detection or apprehension for any offense [here § 841(a)(1)] by any Federal, State, or local law enforcement official." The evidence presented at trial showed that Cyprian was riding as a passenger in a car, holding his infant son on his lap while carrying crack in his pocket. Agents stopped the car to arrest Cyprian for possession with intent to distribute crack. Appearing to comply with the agents' arrest orders, Cyprian got out of the car. As the officers moved toward him to apprehend him, he threw his son at the agents and ran away, only to be caught after a brief pursuit.

There was no evidence that defendant brought his son along for the drive to serve as a decoy or to avert suspicion of possible drug activities. In fact, there was no evidence that defendant brought his son for anything other than babysitting purposes or that defendant entertained an intention, before the car was stopped, of in any way using his son to avoid detection or apprehension.

Nevertheless, there was ample evidence from which the jury could find beyond a reasonable doubt that defendant used his son to create a diversion, momentarily distracting the arresting officers in order to avoid apprehension, albeit temporarily. This evidence is sufficient to support the verdict.

B. Whether the Statute Relied on for Count 4 Encompasses Defendant's Conduct

Defendant argues with some force that his "use" of his son was not the type of use Congress intended to prohibit when it passed the Juvenile Drug Trafficking Act of 1986,[1] that the statute requires some type of "violational" conduct by the minor to incur punishment, and that the rule of lenity mandates that uncertainty as to whether defendant's conduct fits within the prohibited conduct addressed by the statute be resolved in defendant's favor.

The rule of lenity "is a rule of statutory interpretation that dictates that statutory ambiguities be resolved in favor of leniency and prohibits a court from interpreting an ambiguous statute in a way that maximizes the penalty." *Brito*, 136 F.3d at 408. Thus, if the scope of § 861(a)(2) was unclear, the rule would weigh in favor of interpreting § 861(a)(2) as being inapplicable to defendant's conduct. However, while "doubt as to congressional intent should be resolved in favor of lenity for the accused," the rule of lenity, "as is true of any guide to

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[1] Pub.L. No. 99-570, 100 Stat. 3207-10 (1986), originally codified at 21 U.S.C. § 845b(a)(2).

statutory construction, only serves as an aid for resolving ambiguity." *United States v. Cooper*, 966 F.2d 936, 943 & n. 1 (5th Cir. 1992) (citations omitted). "Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language." *United States v. Marmolego*, 59 F.3d 1185, 1188 (5th Cir. 1996), *aff'd*, ___ U.S. ___, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997) (quoting *United States v. Albertini*, 472 U.S. 675, 680, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985)).

While "not a model of meticulous drafting." *United States v. Chin*, 981 F.2d 1275, 1279 (D.C.Cir. 1992) (Bader Ginsburg, J.), the language of § 861(a)(2) is broad and unambiguous. It sanctions an adult such as the defendant who uses a minor to assist in the adult's avoidance of apprehension or detection for a drug offense. There is no hint of any requirement that the minor actively participate in the underlying drug crime. Thus, Congress "indicate[d] the allowable unit of prosecution with clarity." *Cooper*, 966 F.2d 936, 943 n. 1, and the rule of lenity is inapplicable.

Even assuming some ambiguity regarding the role of the minor, reading § 861(a)(2) in connection with § 861(a)(1) negates the defendant's interpretation of the statute. Section 861(a)(1) predicates an adult's conviction on the minor's violation of another drug law. Section 861(a)(2) on its face mandates only that an adult use a minor to assist in avoiding detection or apprehension for the adult's violation of the underlying offense. Reading a requirement that the minor actively violates another drug law into § 861(a)(2) would appear to make (a)(2) superfluous, punishing only that which is already sanctionable under (a)(1).

It is true that the lead case discussing the parameters of § 861(a)(2) refers to the attempt by Congress to "deter criminals from including minors as participants in their illegitimate activities." *United States v. Curry*, 902 F.2d 912, 915 (11th Cir. 1990) (italics added). Such language gives credence to the argument that even if the minor need not directly violate another drug law, § 861(a)(2) requires the minor to purposefully assist the adult in avoiding detection or apprehension. However, active assistance, whether as a lookout or a decoy, would itself be a violation on the part of the minor without § 861(a)(2). Title 18 U.S.C. § 2 punishes aiding and abetting another's commission of an offense. The Circuit's jury instruction on 18 U.S.C. § 2 makes it clear that where "the accused deliberately associate[d] himself in some way with the crime and participate[d] in it with the intent to bring about the crime," a conviction on the underlying offense is warranted. Fifth Circuit Criminal Pattern Jury Instructions, 83 (West, 1997). Thus, a minor purposefully acting to assist an adult in avoiding detection or apprehension would already, via 18 U.S.C. § 2, be guilty of a violation of the underlying drug law. Thus the minor's behavior would already be attributable to the adult under § 861(a)(1). Again, reading some sort of violation or active participation on the part of the minor into § 861(a)(2) would make § 861(a)(2) redundant.

When the wording of the statute is clear it is not necessary or even appropriate to seek to divine the intent of Congress in passing the law. *See, e.g., United States v. Barlow*, 41 F.3d 935, 942 (5th Cir. 1994) ("If the language of [the criminal statute] is clear and unambiguous, then our interpretive journey comes to an end, and we apply that

plain meaning to the facts before us to determine if the Defendant's conduct was punishable under that section.") To the extent that the Court may delve into the legislative history to discern this underlying congressional intent, there is no indication in the record that any member of Congress envisioned the use of minors as defendant used his child in this case – as a projectile. Nevertheless, § 861 was enacted in response to "congressional recognition of the troublesome societal problem created when drug traffickers seek to include minors in their illegal activities." *Curry*, 902 F.2d at 915. Congress' "objective of protecting juveniles as a class," *Chin*, 981 F.2d at 1280 (Bader Ginsberg, J.), and its "battle to prevent the scourge of narcotics from reaching our nation's youth." *Curry*, 902 F.2d at 915, indicate an intent to provide maximum deterrence against the use of minors in the drug trade.

In this case the defendant used his infant son to avoid apprehension by law enforcement for a violation of an underlying drug offense. Such action is clearly sanctioned by the express wording of § 861(a)(2) and not inconsistent with congressional intent. Any countervailing intention does not rise to the "most extraordinary showing of contrary intention in the legislative history" necessary to justify departure from the "plain and unambiguous meaning of the statutory language." *Marmolejo*, 89 F.3d at 1188.

III. CONCLUSION

For the foregoing reasons, defendant Scott Cyprian's conviction must be allowed to stand as to all counts, and

defendant's Motion for a Judgment of Acquittal must be DENIED.

APPENDIX C

21 U.S.C. § 861. Employment or use of persons under 18 years of age

(a) Unlawful acts

It shall be unlawful for any person at least eighteen years of age to knowingly and intentionally –

(1) employ, hire, use, persuade, induce, entice, or coerce, a person under eighteen years of age to violate any provision of this subchapter or subchapter II of this chapter;

(2) employ, hire, use, persuade, induce, entice, or coerce, a person under eighteen years of age to assist in avoiding detection or apprehension for any offense of this subchapter or subchapter II of this chapter by any Federal, State, or local law enforcement official; or

(3) receive a controlled substance from a person under 18 years of age, other than an immediate family member, in violation of this subchapter or subchapter II of this chapter.

(b) Penalty for first offense

Any person who violates subsection (a) of this section is subject to twice the maximum punishment otherwise authorized and at least twice any term of supervised release otherwise authorized for a first offense. Except to the extent a greater minimum sentence is otherwise provided, a term of imprisonment under this subsection shall not be less than one year.

(c) Penalty for subsequent offenses

Any person who violates subsection (a) of this section after a prior conviction under subsection (a) of this section has become final, is subject to three times the maximum punishment otherwise authorized and at least three times any term of supervised release otherwise authorized for a first offense. Except to the extent a greater minimum sentence is otherwise provided, a term of imprisonment under this subsection shall not be less than one year. Penalties for third and subsequent convictions shall be governed by section 841(b)(1)(A) of this title.

(d) Penalty for providing or distributing controlled substance to underage person

Any person who violates subsection (a)(1) or (2) of this section

(1) by knowingly providing or distributing a controlled substance or a controlled substance analogue to any person under eighteen years of age; or

(2) if the person employed, hired, or used is fourteen years of age or younger,

shall be subject to a term of imprisonment for not more than five years or a fine of not more than $50,000, or both, in addition to any other punishment authorized by this section.

(e) Suspension of sentence; probation; parole

In any case of any sentence imposed under this section, imposition or execution of such sentence shall not be

suspended and probation shall not be granted. An individual convicted under this section of an offense for which a mandatory minimum term of imprisonment is applicable shall not be eligible for parole under section 4202 of Title 18 until the individual has served the mandatory term of imprisonment as enhanced by this section.

(f) Distribution of controlled substance to pregnant individual

Except as authorized by this subchapter, it shall be unlawful for any person to knowingly or intentionally provide or distribute any controlled substance to a pregnant individual in violation of any provision of this subchapter. Any person who violates this subsection shall be subject to the provisions of subsections (b), (c), and (e) of this section.